Supreme Court, U.S.
FILED

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No. 10-

In The
Supreme Court of the United States

MANUEL KRAMER,
PETITIONER,

vs.

CITY OF SOMERVILLE ZONING BOARD OF APPEALS ET ALS,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPEALS COURT Of MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

MANUEL KRAMER, *pro se*
94 BEACON STREET, APT. 67
Somerville, MA 02143
(617) 661-6285

Blanchard Press, Inc. – Boston, MA 02210 – 617-426-6690

QUESTION PRESENTED FOR REVIEW

1. Does Massachusetts G.L. c. 258 § 10(c) confer "sovereign immunity" upon city officials who, while acting under color of law, violate a person's federal and state civil rights?

2. Should a trial court allow a Rule 12(c) Motion for Judgment on the Pleadings as a matter of law, if the defendants' Answer denies relevant claims in a plaintiff's Complaint; and, if the court considers but does not exclude matters outside the pleadings?

3. Is a civil defendant's affidavit, as the sole source of material facts for which he claims there are no genuine issues, sufficient to support his motion for summary judgment in his favor; especially, if the affiant's signature is clearly a forgery with a non-conforming, untraceable notarization?

4. Should a professional architectural firm be responsible to have known that its design would devalue an abutter's property?

5. Should a counterclaim, filed by an attorney, that was adjudged by the court as having no basis in law be deemed to be frivolous?

PARTIES TO THE PROCEEDING

PLAINTIFF-PETITIONER

1. Manuel Kramer – Owner-occupier of condominium unit No. 67 at 94 Beacon Street, Somerville, Massachusetts 02143. – abutter to 88 Beacon Street.

DEFENDANTS-RESPONDENTS

1. Philip Ercolini, Gerald McCue, Maryann Heuston, Herbert Foster, Nicholas Iannuzzi, as they are members of the Somerville Zoning Board of Appeals (collectively, "ZBA"); and the City of Somerville, Massachusetts (collectively, "City defendants").

2. Nextel Communications of the Mid-Atlantic, Inc. and John Kovacs, individually and as agent of Nextel Communications (collectively, "Nextel").

3. 88 Beacon Street Realty, Inc., Phil Privitera, individually and as controller of 88 Beacon Street Realty, Inc. (collectively, "88 Beacon").

4. Greenman & Pedersen, Inc. ("GPI") – Designer and Contractor for the installation of Nextel's antennas and equipment shelter on the rooftop of 88 Beacon Street.

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BASIS FOR JURISDICTION IN THIS COURT

Jurisdiction of this Court is invoked, pursuant to the provisions of Supreme Court Rule 10 (c), in that Massachusetts courts decided important federal questions in a way that conflicts with relevant Supreme Court decisions. The Massachusetts Superior Court, on October 20, 2008, dismissed the Plaintiff's complaint against the Somerville ZBA based of its opinion that the Massachusetts Tort Claims Act, G.L. c. 258, §10(e), provides "sovereign immunity" to members of the ZBA for monetary and/or declaratory relief. On April 22, 2010 the Massachusetts Appeals Court affirmed said dismissal. And on August 3, 2010 the Massachusetts Supreme Judicial Court ("SJC") denied Petitioner's application for Further Appellate Review ("FAR").

FACTS MATERIAL TO QUESTIONS PRESENTED FOR REVIEW

The most important issue before this Court is whether the Massachusetts Tort Claims Act at G.L. 258, § 10(e) confers "sovereign immunity" upon Somerville city officials, acting in their capacity under color of law. The Massachusetts Superior Court dismissed the Plaintiff's suit against the City and its ZBA by its opinion that:

> The City defendants correctly point out that the Massachusetts Tort Claims Act, at G.L. c. 258, §10(e)[1] exempts from its broad statutory waiver of sovereign immunity "any claim based on the issuance [of] ... any permit, license, certificate, order or similar authorization." Assuming that the ZBA — which had the duty of notifying abutters under G.L. c. 40A, §11 — was negligent in its failure to notify the plaintiff, therefore, it is immune from a suit for damages. See A-9.

And on April 22, 2010 he Massachusetts Appeals Court affirmed the Superior Court's dismissal against the City defendants; and, on August 3, 2010, the SJC denied the Plaintiff-Petitioner's application for FAR.

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[1] G.L. c. 258,10(e) does not contain either the phrase or the concept of "sovereign immunity" for municipal employees acting under color of law. The idea of "sovereign immunity" for City officials is a specious theory of law, contrived by the Somerville assistant city solicitor. It is not supported by precedent.

The Petitioner contends that the Superior Court's opinion, *supra*, and the subsequent dismissal of his suit, conflicts with well-settled Supreme Court decisions; viz.,

1. *Ex parte Young*, 209 U.S. 123 (1908)
2. *Scheuer v. Rhodes* , 416 U.S. 232 (1974).
3. *Monell v. New York City Dept. of Social Services*, 436 U. S. 658 (1978).

The *Scheuer* Court, at 237, wrote:

> However, since *Ex parte Young*, 209 U. S. 123 (1908), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law. Ex parte Young teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he
>
> > "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.*, at 159-160. (Emphasis supplied.)

The *Monell* Court's decision, delivered by Mr. Justice Brennan, was:

> we now overrule *Monroe v. Pape, supra*, insofar as it holds that local governments are wholly immune from suit under § 1983. *Id.* at 663.

And the *Monell* Court concluded its opinion with:

> Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. *Id.* at 690-691

BRIEF SUMMARY OF ORIGINS OF THIS ACTION[2]

This case arose from the granting of a special building permit by the Somerville ZBA to Nextel to erect antennas and an equipment structure on the rooftop of 88 Beacon Street. The Plaintiff, an abutter at 94 Beacon Street first became aware, on May 4, 2003, that a permit had been granted after structures were under construction that blocked more than one third of his panoramic view of the Somerville-Boston-Cambridge skyline because he had not been given the statutory notice of the public hearing required by G.L. c. 40A, §11.

The Plaintiff, on May 20, 2003, filed his suit against the ZBA pursuant to G.L. c. 40A, §17, the Massachusetts Zoning Statute, and G.L. c. 231A, §§ 1 &2, the Massachusetts Declaratory Judgment Statute, in which he claimed that his property value was diminished by the loss of his view from his living-room and bedroom picture widows. He also alleged that his due process rights, as guaranteed by the Fourteenth Amendment, were denied because of lack of statutory notice required by G.L. c. 40A, §11.

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[2] The events listed in this section can be verified by the docket entries of the Massachusetts Middlesex Superior Court, case number MICV 2003-2174.

The Plaintiff subsequently, on June 12, 2003, filed a Joined and Amended Complaint in which he joined Nextel, GPI, and 88 Beacon as defendants, wherein he alleged that the private defendants, knowing that he had not been given notice, misrepresented information to the ZBA in order to facilitate the granting of the permit to Nextel. Attorney Privitera filed a counterclaim, on his own behalf, in which claimed abused the process by the Plaintiff's Joined and Amended Complaint.

All defendants, moved to dismiss. They argued that the plaintiff had not filed his complaint timely. And Superior Court (Lauriat, J.) dismissed the Plaintiff's case in its entirety. The Plaintiff appealed and the Appeals Court, on November 29, 2005, reversed the Superior Court's dismissal and remanded the case back to the Superior Court. See *Kramer v. Zoning Board of Appeals of Somerville*, 65 Mass. App. Ct. 186 (2005).

On remand the Plaintiff moved to vacate Rule 26(c) protective orders that had been allowed for all the defendants since the inception of his suit. After much hurly-burly over discovery, all the defendants, at different times, again moved for and were allowed Rule 26(c) protective orders. The plaintiff, who had never sought a protective order, was deposed for three and a half hours by the private defendant attorneys.

In January 2007 the private defendants moved for Summary Judgment.

On July 2, 2007 Judgments on Motions for Summary Judgment were allowed for GPI and 88 Beacon; and, in part, for Nextel. Entered by the Court (Hogan, J.).

On September 13, 2007 Plaintiff moved for Pre-Trial Procedure (Rule 16) on issues surviving the order allowing Motions for Summary Judgment for the private defendants.

On October 10, 2007 at the hearing on Plaintiff's Motion for Pre-Trial Procedure, the Court (Billings, J.) concluded that:

> It is also clear that the plaintiff's constitutional and common law claims in this action cannot be effectively adjudicated without a final decision of the Board of Appeals, having a new hearing in which the plaintiff has had notice and the opportunity to be heard;

whereupon he ordered a *de novo* hearing by the ZBA to be commenced on or before February 29, 2008.

A *de novo* hearing was held and on July 10, 2008 the ZBA issued a decision, which they filed with the Somerville Clerk, that required Nextel to remove all its equipment from the rooftop of 88 Beacon Street. In addition, on July 10, 2008, at a status hearing, the Court (Billings, J.) solicited all parties to submit dispositive motions that would terminate the case.

As a consequence of the ZBA's decision that ordered Nextel to remove all its equipment from the rooftop of 88 Beacon Street, Nextel, on August 8, 2008, filed a separate action in the Federal District Court of Massachusetts, *Nextel Communications of the Mid-Atlantic, Inc. v. The City of Somerville, et al*, C.A. No. 08-CA-11357-RWZ, in which it sought to have the District Court reverse the ZBA's decision.[3]

On October 8, 2008 Nextel filed its Second Motion for Summary Judgment.

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[3] Federal case law settled the fact that federal district courts lack jurisdiction and the authority to review state zoning decisions. This is explained with more detail herein under section LIMIT OF DISTRICT COURT JURISDICTION OVER ZONING DECISIONS on page 12.

On October 9, 2008 City of Somerville filed Motion for (Rule 12) Judgment on Pleadings in which the Somerville assistant city solicitor argued that Massachusetts G.L. c. 258, § 10(e) confers "sovereign immunity" upon the members of its ZBA.

On October 23, 2008 the Superior Court (Billings, J.) allowed Nextel's Second Motion for Summary Judgment in favor of Nextel; and, Somerville's 12(c) Motion for Judgment on the Pleadings in favor of the City defendants with his proclamation that:

> The City defendants correctly point out that the Massachusetts Tort Claims Act, at G.L. c. 258, § 10(e) exempts from its broad statutory waiver of sovereign immunity "any claim based on the issuance [of] ... any permit, license, certificate, order or similar authorization."

On November 4, 2008 the Plaintiff appealed.

After briefing and oral arguments the Appeals Court, on April 22, 2010, issued its *MEMORANDUM AND ORDER PURSUANT TO RULE 1:28.* The Appeals Court tribunal determined that:

> Upon review of the briefs and record, we are constrained to reverse, in part, the judgment entered by the Superior Court in favor of the private defendants, on summary judgment, as there are genuine issues of material facts in dispute.

And, although they acknowledged that the Plaintiff's rights were infringed by the City defendants, they affirmed the dismissal of his Complaint against the City officials who had infringed the Plaintiff's rights.
See A-2.

In an attempt to reinstate his entire case, the Plaintiff, on May 5, 2010, filed an application for FAR in the SJC. In his Opposition to Plaintiff's Application for FAR the Somerville assistant city solicitor, for the first time, cited *Lopes v. Commonwealth*, 442 Mass. 170 (2004) as the controlling precedent to support his theory of "sovereign immunity" for city officials. While it is true that the *Lopes* Court ruled the Commonwealth was protected by "sovereign immunity" they based their decision on two reasons. First, the *Lopes* plaintiff had sued the State rather than any State official. And second, there was no constitutional issue raised in the trial court. The *Lopes* Court, explained this as follows:

> The plaintiffs here have not sued any State official, but the State itself. Even if they had sued a State official, there is no constitutional issue before us. *Id* at 180.

These conditions were clearly not so in instant action. The Plaintiff-Petitioner did not sue the State. He had, in fact, sued City officials. And his constitutional rights under the due process clause of the Fourteenth Amendment were raised in the trial court; viz., lack of statutory notice as a constitutional right was raised by the Plaintiff. Moreover, the Appeals Court tribunal acknowledged that the Petitioner's [constitutional] rights were indeed infringed due to "lack of notice" by the City defendants. See A-2.

On August 3, 2010 the SJC denied Plaintiff's application for FAR.

REASONS FOR ALLOWING CERTIORARI

The Massachusetts Appeals Court clearly acknowledged that the Petitioner's rights were infringed by the City defendants. See *MEMORANDUM AND ORDER PURSUANT TO RULE 1:28.*, A-1

> It should not be necessary to mention that in the plaintiff's initial appeal, this court held that his rights had been infringed. *Id.* at footnote 3.

The constitutional rights referred to by the Appeal Court was the right to adequate notice. See *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 795 (1983). ("The manner of notice served to appellant did not meet the requirements of The Due Process Clause of the Fourteenth Amendment."). See also *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)

In *Steffel v. Thompson*, 415 U.S. 452, at 460-461 (1974), the Supreme Court opined that:

> state courts have the solemn responsibility, equally with the federal courts "to guard, enforce, and protect every right granted or secured by the constitution of the United States. ..." *Robb v. Connolly*, 111 U.S. 624, 637, (1884).

And the Supreme Court in *Robb v. Connolly* opined:

> Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States, and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the State courts are required to take an oath to support that Constitution; and they are bound by it, and the laws of the United

> States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding." If they fail therein, and withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination. *Id* at 637.

The Appeals Court, however, instead of allowing a trial under the Declaratory Judgment Statute, G.L. c. 231A, §§ 1 & 2, to determine an appropriate remedy for the infringement of the Plaintiff's rights by the city officials, they instead *rewarded* the ZBA and its members by affirming the dismissal of his case against them. Petitioner contends that to allow a state to establish the precedent that a doctrine of "sovereign immunity" that protects city officials who infringe a person's constitutional rights is contrary to and repugnant to the Fourteenth Amendment and 42 U.S.C. § 1983. Such a doctrine erodes and defeats the letter and the spirit of the Due Process Clause of the Fourteenth Amendment.

The Supreme Court of Colorado noted in *Espinoza v. O'Dell*, Colo., 633 P.2d. 455, at 460 (1981) that:

> a right based on a violation of § 1983 was intended by Congress to be vindicated by means of remedies and punishments established under state law, at least, so far as the "state law" is not inconsistent with the Constitution and laws of the United States.

See also *Monell, supra*, ("Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief.") But the Appeals court by its order states:

> On this record, we see no reason to disturb so much of the judgment as entered in favor of Somerville and the board. See A-2.

affirmed the Superior Court's dismissal of the Plaintiff's complaint against the ZBA.

The questions presented for review herein are the same as the issues presented for review to the Massachusetts Appeals Court. In its *MEMORANDUM AND ORDER PURSUANT TO RULE 1:28* the Appeals Court never addressed any of these issues. Petitioner contends that the Massachusetts courts of last resort should have, at least, reviewed the City's specious theory of "sovereign immunity" for city employees, acting in their official capacity. By refusing to review this matter the courts of Massachusetts have, in effect, let stand a Superior Court precedent of "sovereign immunity" for all city employees who act "in a manner violative of he Federal Constitution."

The *Steffel* Court, in addition, concluded:

> The solitary individual who suffers the deprivation of his constitutional rights is . no less deserving of redress than one who suffers together with others. *Id.* at 474.

As in *Steffel*, the Petitioner, an eighty-seven year old veteran of World War II, is the solitary *pro se* Plaintiff in this action and he contends that he is no less deserving of redress than any other person who suffers deprivation of his or her constitutional rights.

As far as the private defendants are concerned, the fact that the Appeals Court tribunal determined in the first paragraph of its *MEMORANDUM AND ORDER PURSUANT TO RULE 1:28:*

> Upon review of the briefs and record, we are constrained to reverse, in part, the judgment entered by the Superior Court, in favor of the private defendants, on summary judgment, as there are genuine issues of material fact in dispute. See A-1.

The Petitioner contends that allowance of summary judgment for the private defendants, due to their tortious acts, should be reversed in its entirety . For as the Supreme Court opined in *Anderson v. Liberty Lobby, Inc*, 477 U.S. 242, (1986).

> Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. *It by no means authorizes trial on affidavits.* Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Adickes, 398 U. S., at 158-159. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. (Emphasis added.) *Id.* at 255.

LIMIT OF DISTRICT COURT JURISDICTION OVER ZONING DECISIONS

That the Federal District Court lacks jurisdiction and the authority to review decisions of the ZBA was settled by *Nextel Comm. of Mid-Atlantic v. Town of Wayland MA*, 231 F.Supp.2d 396, at 410 (D. Mass. 2002). Federal District Judge Keeton's lucid analysis in arriving at his conclusion was based on 47 U.S.C. § 332(c)(7)(A) which states the following:

> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

Judge Keeton's ruling and order is settled law. It was never appealed by Nextel.

CONCLUSION

Judge Billings' conclusory opinion, A-8:

> On one level the plaintiff — after much judicial process and substantially more time elapsed than one would wish — has at last emerged the victor,

rings hollow. The Plaintiff's victory was at very best a Pyrrhic victory. After more than seven years of litigation, and despite the ZBA's final decision that Nextel's equipment be removed from the rooftop at 88 Beacon Street, Nextel's offending structures remains in place. He has been deprived of the full value of his property for more than seven years and there is little

prospect that the eighty-seven year old plaintiff will be made whole again during his life time. It has cost him many thousands of dollars to protect his property interest and his constitutional rights.

The real victors, thus far, are the Somerville city employees who have established a Superior Court precedent that they can act "in a manner violative of the United States Constitution" and be protected by a trickle-down doctrine of "sovereign immunity." City employees will henceforth be free to deprive any person of his or her civil rights without facing liability. This opens the door for mischief by any unscrupulous municipal employee.

Attorney Grill, the attorney of record for Nextel, has also emerged a victor. He has demonstrated to his corporate client that he can deceive the Massachusetts Superior Court with a forged affidavit; and get away with it!

The most important loser in this case, thus far, is the Due Process Clause of the Fourteenth Amendment.

That it is the solemn responsibility for State courts to "guard, enforce, and protect every right granted or secured by the Constitution" cannot be held in dispute. In addition, the *pro se* Plaintiff-Petitioner believes that it is equally incumbent of him, as it is for every responsible citizen, to exercise his or her civic duty in order to protect the rights that were provided for him or her by the due process clause of the Fourteenth Amendment.

WHEREFORE:

On the basis of the foregoing established facts and arguments, the Petitioner respectfully requests that this Honorable Court:

Issue a Writ for Certiorari to the Massachusetts Appeals Court in order to allow this Court to review the seven year old record of this case:

Or in the alternative,

Remand his case back to the Massachusetts Superior Court for a jury trial, pursuant to the Declaratory Judgment Statute, G.L. c. 231A, § 9[4], in order to determine an appropriate remedy for the deprivation of his constitutional and common law rights.

Date: September 20, 2010

Respectfully submitted by,

_____

Manuel Kramer, *pro se*

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[4] G.L. c.231A, § 9 reads as follows: This chapter is declared to be remedial. Its purpose is to remove, and to afford relief from, uncertainty and insecurity with respect to rights, duties, status and other legal relations, and it is to be liberally construed and administered. Nothing in this chapter shall be held to affect the jurisdiction of the land court, and the procedure established hereby shall be in addition to any other procedure for declaratory relief.

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

08-P-2145

MANUEL KRAMER,
vs.

ZONING BOARD OF APPEALS OF SOMERVILLE & others.[1]

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

Upon review of the briefs and record, we are constrained to reverse, in part, the judgement entered by the Superior Court, in favor of the private defendants, on summary judgement, as there are genuine issues of material fact in dispute.[2] We remand the matter to the Superior Court for trial on the issue whether the plaintiff has suffered a compensable loss, as a result of the installation of

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[1] City of Somerville; Nextel Communications; John Kovacs; individually and as an agent of Nextel Communications; 88 Beacon Street Realty, Inc.; Phil Privitera, individually and as controller of 88 Beacon Street Realty Inc.; and Greenman & Pedersen, Inc.

[2] For the background surrounding this lengthy civil dispute see *Krumer* v. *Zoning Bd. of Appeals of Somerville*, 65 Mass. App. Ct. 186 (2005). In particular , the named private defendants have not shown that the visual impact of the telecommunications antennas and such other related equipment is not other than as alleged by the plaintiff.

telecommunications antennas and such other related equipment on the rooftop of the building that immediately abuts the home of the plaintiff.

Subsequent proceedings in a related matter in the United States District Court for the District of Massachusetts notwithstanding, it has been made to appear that the plaintiff has demonstrated a plausible showing of harm -- if for no other reason than by the findings rendered by the Somerville zoning board of appeals (board) -- due to acts and omissions of the private defendants to this action. The findings of the board have not been shown to be clearly erroneous or the product of an abuse of discretion.[3] The defendants have not offered expert proof to rebut the plaintiff's allegations of diminished market value of his private property. Compare *Tsagronis v. Board of Appeals of Wareham*, 415 Mass. 329, 330 & n.4 (1993); *Denneny v. Zoning Bd. of Appeals of Seekonk*, 59 Mass. App. Ct. 208, 213 (2003). [4]

So much of the judgement that dismisses the plaintiff's claims against defendants Nextel Communications, John Kovacs, 88 Beacon Street Realty, Inc., Phil Privitera, and Greenman & Pederson, Inc., for harm to the plaintiff's property is reversed. The remainder of the judgement is affirmed.[5] The case is remanded to the Superior Court for further proceedings consistent with this memorandum and order.

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[3] It should not be necessary to mention that in the plaintiff's initial appeal, this court held that his rights had been infringed. See note 2, *supra*.

[4] If necessary, the plaintiff ought to be afforded leave to name an expert, with an appropriate time period for discovery by defendants.

[5] On this record, we see no reason to disturb so much of the judgement entered in favor of Somerville and the board.

So ordered.

By the court (Cypher, Brown & Wolohojian, JJ.)

Entered: April 22, 2010 Assist. Clerk

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 03-2174

MANUEL KRAMER,
vs.

PHILIP ERCOLINI, GERALD McCUE, MARYANN HEUSTON, HERBERT FOSTER, NICHOLAS IANNUZZI, as they are Members of the Somerville Zoning Board of Appeals; and the CITY OF SOMERVILLE, NEXTEL COMMUNICATIONS, JOHN KOVACS (Individually and as Agent of Nextel Communications), 88 BEACON STREET REALTY INC., PHIL PRIVATERA (Individually and as Controller 88 Beacon Street Realty, Inc.) and GREENMAN - PEDERSEN, INC.

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MEMORANDUM AND ORDER FOR JUDGEMENT

For the reasons that follow, Defendant Philip Ercolini, Gerald McCue, Maryann Heuston, Herbert Foster, and the City of Somerville Zoning Board of Appeals' Motion for Judgement on pleadings (Rule 12), and the Second Motion for Summary Judgement Submitted by Nextel Communications, Inc., are both ALLOWED.

BACKGROUND

This case has traveled a tortuous path. As more fully set out in Kramer v. Zoning Bd. of Appeals of Somerville, 65 Mass. App. Ct. 186 (2005), the plaintiff owns a

condominium unit on the top floor of a building abutting 88 Beacon Street, Somerville. Defendant Nextel applied to the Somerville ZBA for a special permit to erect wireless antenna facilities (an antenna and an equipement shelter) on the roof of No. 88. The plaintiff did not receive notice of the hearing, and therefore did not attend.

The ZBA allowed the application on October 11, 2001. The plaintiff, as recited in the Appeals Court's decision, "arose on May 4, 2003, to find roughly one-third of the view from his living room picture window blocked by the construction of the structure, about forty feet from his window, on the roof of the adjacent building, 88 Beacon Street." 65 Mass. App. Ct. at 188.

Sixteen days later the plaintiff, representing himself, filed suit in this Court. The Amended Complaint is in seven counts:

Count 1 asserts that Nextel made "misrepresentations and intentional deceptions" to the ZBA, as a result of which the tower was erected and Kramer's property value was damaged.

Count 2 alleges that defendants Kovacs (a Nextel employee), Privitera (the controller of the entity owning No. 88), and Greenman & Pedersen (an architectural firm) conspired to misrepresent information in studies supporting Nextel's application, knowing that the misrepresentations would go unchallenged because proper notice had not been sent to the abutters.

Counts 3, 4, 5, 6, and 7 continue the theme of Count 2, referencing specific statements in the application materials that are alleged to have been fraudulent.

The prayers for relief asserted in the Amended Complaint are that the Court order:

> 1. Nextel to remove all fabricated construction from the rooftop on the 88 Beacon Street apartment building that blocks his direct view of

the Somerville - Cambridge - Boston Skyline.

Or in the alternative

2. Compensatory damages that this Court deems proper to the plaintiff for the damage he has suffered as the result of the defendants' intentional misrepresentations to the Somerville Board of Appeals.

3. Any other appropriate judgement of declatory relief in equity to make the plaintiff whole again.

On October 2, 2003 another judge of this court allowed each of the defendants' motions to dismiss, on the grounds that the plaintiff had filed his complaint after the ninety-day period allowed by G.L. c. 40 §17, and the plaintiff had no property interest protected under the Fourteenth Amendment to the U.S. Constitution.[1] The plaintiff appealed, and the judgement was reversed. The Appeals Court, noting the "critical" nature, in the statutory zoning scheme, of interested parties' right to notice and the opportunity to be heard (65 Mass. App. Ct. at 192), held that the statutory deadlines for review "are not designed to foreclose access to judicial review when there has been a total failure of notice to one such as Kramer, who was entitled to receive it." Id at 193.

> Accordingly, we conclude that, at least where there has been a complete failure of notice of a public hearing in advance of the granting of a special permit, the ninety-day limitation in G.L. c. 40A § 17, should not be deemed to run until the

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[1] A constitutional claim was raised in the original complaint, but omitted from the amended complaint.

> abutter has notice of the project to which he objects .... [O]n remand the Superior Court judge should determine whether the board provided any other form of statutory notice. If no notice sufficient to meet the statutory requirements was provided, the board must hold a new hearing.

Id. at 194-96

The matter returned to this court. The defendants other than the City and the ZBA filed motions for summary judgement which, after hearing, a second judge (Hogan, J.) allowed *in toto,* except as to Nextel:

> The Plaintiffs claim against Nextel, however, survives in two respects. First, to the extent the plaintiff challenges the issuance of the permit and seeks injunctive relief ordering the removal of the facilities which Nextel owns, the plaintiff has a valid claim against Nextel. Moreover, there is some evidence in the record showing that in applying for the special permit, Nextel submitted a list of abutting property owners that did not sufficiently identify the plaintiff and others living in (his building), which may have resulted in the ZBA failing to give notice to the plaintiff. Although, there is no evidence that such submisssion was intentional or deceitful, the evidence may support a claim for negligence against Nextel. Accordingly, to the extent that the plaintiff has evidence supporting a claim for negligence, Nextel's motion for summary judgement is denied.

(Paper #74)

The Plaintiff thereafter filed a motion to Schedule MICV2003-02174 for Pre-Trial Procedure [etc.](Paper #77). Accepting the parties' stipulation that the plaintiff had not, in fact, been provided notice of the original ZBA

hearing, I ordered on October 24, 2007 that the ZBA

> hold a new, de novo hearing on Nextel's application on or before February 28, 2008, having first provided proper notice to all persons entitled thereto under G.L. c. 40A §11. A *"de novo"* hearing means, without limitation, that the Board's prior allowance of the special permit shall receive no deference and no presumption of validity, and there shall be no consideration of hardship or other factors stemming from the fact that the tower has previously been permitted and constructed.

(Paper #79)

Following Nextel's unsuccessful interlocutory appeal, the ZBA held its *de novo* hearing, which extended over several dates. On July 10, 2008, the ZBA issued a new decision, ordering that all of Nextel's equipment be relocated from the roof, the atenna to be "most likely, facade mounted and screened" and the equipment shelter moved down to the parking lot.

Neither side, apparently, has held a victory celebration. The plaintiff has filed a new appeal from the July 10 decision, in this court. Nextel has appealed it under the Telecommunications Act of 1996 in federal court. Meanwhile, the equipment remains in place.

On October 16, 2008, I heard the City's Motion for Judgement on the Pleadings, and Nextel's new Motion for Summary Judgement.

DISCUSSION

On one level the plaintiff – after much judicial process, and substantially more time elapsed than one would wish- has at last emerged the victor. Although he is not entitled

to the court order that "Nextel...remove all the fabricated construction from the rooftop on the 88 Beacon Street apartment building that blocks his direct view of the Somerville - Cambridge - Boston skyline" that was his primary prayer for relief, he did receive a determination that he was entitled to, but did not receive, notice of the original ZBA hearing; and thereat, he evidently persuaded the ZBA that the Nextel equipment ought not to be on the roof outside his window. As things stand now, therefore - subject to both sides' appellate rights - the offending equipment is to be removed from his view.

If the plaintiff was entitled to more than this - that is, if the ZBA should have ordered the equipment removed not merely from the rooftop, but altogether from the premises at 88 Beacon Street - he has his forum in his new Superior Court case. If he was entitled to less - that is, if the ZBA's relocation order transgressed the federal Telecommunications Act - the federal court will say so. If both parties lose their appeals, the ZBA's decision will be law.

The statutory schemes embodied in the Zoning Act and the federal Telecommunications Act provide the due process (notice, the opportunity to be heard, and appellate remedies in the event of administrative or judicial error) in excess of that required by the state and federal constitutions. In this case the plaintiff has received and continues to receive, the process that is due to him, albeit less expeditiously than one would wish.

The City defendants correctly point out that the Massachusetts Tort Claims Act, at G.L. c. 258 § 10(e), exempts from its broad statutory waiver of sovereign immunity "any claim based issuance [of] .... any permit, license, certificate, order or similar authorization." Assuming that the ZBA – which had the duty of notifying abutters under G.L. c. 40A, §11– was negligent in its

failure to notify the plaintiff, therefore, it is immune from suit or damages. This means that the plaintiff's sole remedy against the City and its ZBA is that which he has received – a remand and a *de novo* hearing. As neither the original nor the amended complaint alleges any other wrongdoing against the ZBA or the City, they are entitled to judgement on the pleadings.

Nextel, too, is entitled to judgement. Although Judge Hogan's order held out the possibility of liability in negligence for having provided the ZBA with an incomplete list of abutters, the amended complaint is focused on fraud and conspiracy; no negligence claim is asserted, and it does not appear that either side addressed such a theory in the original motion for summary judgement.

Nextel *has* addressed the issue this time around, and points out that under the afore-cited section 11 of the Zoning Act, it was the ZBA that had the duty of notifying abutters and abutters-to-abutters of the hearing. As the appeals Court said in this case, "This notice must be provided by the board or its agent, and the task of providing it cannot be delegated to the interested petitioner." 65 Mass. App. Ct. at 190, citing *Kane v. Board of Appeals of Medford*, 273 Mass. 97, 102-103 (1930) and *Planning Bd. of Peabody v. Board of Appeals of Peabody*, 358 Mass. 81, 83 (1970).That the board may seek the assistance of applicants in preparing the abutter list does not mean that the applicant assumes a duty in tort to persons who should be on the list.

Finally, I note that the plaintiff has failed to identify where, in the voluminous case, file, there is evidence that Nextel was responsible for the error in the notice list, an error for which the ZBA has acknowledged responsibility. Nextel is therefore entitled to summary judgement on the remaining claim against it.

****

One of the defendants, Phil Privatera, asserted a counterclaim against the plaintiff, for defamation. The statements that are the subject of the counterclaim relates are the allegations of the Amended Complaint. See Counterclaim, ¶6.

"Statements made in the course of a judicial proceeding which pertain to that proceeding are, of course, absolutely privileged and cannot support a claim of defamation, even if uttered with malice or in bad faith." Correllas v. Vivieros, 410 Mass. 314, 319 (1991). The Privitera counterclaim will therefore be dismissed, bringing an end to this proceeding.

ORDER FOR JUDGEMENT

For foregoing reasons, Defendant Philip Ercolini, Gerald McCue, Maryann Heuston, Herbert Foster, and the City of Somerville Zoning Board of Appeals' Motion for Judgement on pleadings (Rule 12), and the Second Motion for Summary Judgement Submitted by Nextel Communications, Inc., are both ALLOWED.

Final judgement to enter, (1) declaring (a) that the plaintiff was entitled to, but did not orginally receive, notice of the Somerville Zoning Board of Appeals hearing on Nextel's application to erect antenna equipment on 88 Beacon Street, and (b) that as a result of that failure he was entitled to, and has since received, a *de novo* hearing and decision on that application, and (c) dismissing the remainder of the Complaint, as well as the Counterclaim of defendant Privitera.

signed

Dated: October 20, 2008 Thomas P. Billings,
Associate Justice

NB

SUPREME JUDICIAL COURT
for the
COMMONWEALTH OF MASSACHUSETTS
John Adams Courthouse
One Pemberton Square, Suite 1400
Boston, Massachusetts 02108-1724
Telephone 617-557-1020, Fax 617-557-1145

Manuel Kramer
94 Beacon Street, Unit 67
Somerville, MA 02143

RE: Docket No. FAR 18828

MANUEL KRAMER,
vs.
ZONING BOARD OF APPEALS OF SOMERVILLE & others.

Middlesex Superior Court No. MICV2003-02174
A.C. No. 2008 - P - 2145

NOTICE OF DENIAL OF F.A.R. APPLICATIONS

Please take note that on 08/03/10, the above-captioned Applications for Further Appellate Review, filed for Manuel Kramer and for Nextel Communications & another, were denied

Susan Mellen, Clerk

Dated: August 3, 2010
To: Manuel Kramer
Matthew J. Buckly, Ass't City Solicitor
Brendan P. Mitchell, Esquire
Atty. Steven E. Grill
Philip J. Privitera, Esquire
A. Neil Hartzell, Esquire

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment.

Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C.§1983.Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

RELEVANT GENERAL LAWS OF MASSACHUSETTS.

Chapter 40A: Section 11. Notice requirements for public hearings; parties in interest defined; review of special permit petitions; recording copies of special permit and variance decisions.

In all cases where notice to individuals or specific boards or other agencies is required, notice shall be sent by mail, postage prepaid. "Parties in interest" as used in this chapter shall mean the petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner as they appear on the most recent applicable tax list, notwithstanding that the land of any such owner is located in another city or town, the planning board of the city or town, and the planning board of every abutting city or town.

Chapter 40A: Section 17. Judicial review.

If the complaint is filed by someone other than the original applicant, appellant or petitioner, such original applicant, appellant, or petitioner and all members of the board of appeals or special permit granting authority shall be named as parties defendant with their addresses. ...The court shall hear all evidence pertinent to the authority of the board or special permit granting authority and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of such board or special permit granting authority or make such other decree as justice and equity may require. The foregoing remedy shall be exclusive, notwithstanding any defect of procedure or of notice other

than notice by publication, mailing or posting as required by this chapter, and the validity of any action shall not be questioned for matters relating to defects in procedure or of notice in any other proceedings except with respect to such publication, mailing or posting and then only by a proceeding commenced within ninety days after the decision has been filed in the office of the city or town clerk, but the parties shall have all rights of appeal and exception as in other equity cases.

CHAPTER 231A. PROCEDURE FOR DECLARATORY JUDGMENTS.

Chapter 231A: Section 1. Power to make declaratory determination; jury questions

The supreme judicial court, the superior court, the land court and the probate courts, within their respective jurisdictions, may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings and whether any consequential judgment or relief is or could be claimed at law or in equity or not; and such proceeding shall not be open to objection on the ground that a merely declaratory judgment or decree is sought thereby and such declaration, when made, shall have the force and effect of a final judgment or decree and be reviewable as such; provided, that nothing contained herein shall be construed to authorize the change, extension or alteration of the law regulating the method of obtaining service on, or jurisdiction over, parties or affect their right to trial by jury. When a declaration of right, or the granting of further relief based thereon, shall involve

the determination of issues of fact triable by a jury as of right and as to which a jury trial is duly claimed by the party entitled thereto, or issues which the court, in accordance with the practice of courts of equity, considers should be tried by a jury, such issues may be submitted to a jury in the form of questions, with proper instructions by the court, whether a general verdict be required or not.

Chapter 231A: Section 2. Controversies to which declaratory judgment procedure is applicable.

The procedure under section one may be used to secure determinations of right, duty, status or other legal relations under deeds, wills or written contracts or other writings constituting a contract or contracts or under the common law, or a charter, statute, municipal ordinance or by-law, or administrative regulation, including determination of any question of construction or validity thereof which may be involved in such determination. Said procedure under section one may be used in the superior court to enjoin and to obtain a determination of the legality of the administrative practices and procedures of any municipal, county or state agency or official which practices or procedures are alleged to be in violation of the Constitution of the United States or of the constitution or laws of the commonwealth, or are in violation of rules or regulations promulgated under the authority of such laws, which violation has been consistently repeated; provided, however, that this section shall not apply to the governor and council or the legislative and judicial departments. For the purpose of this section practices or procedures mean the customary and usual method of conducting municipal, county, state agency or official business.

The foregoing enumeration shall not limit or restrict the

exercise of the general powers conferred in section one in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

Chapter 231A: Section 9. Purpose and construction of declaratory judgment provisions.

This chapter is declared to be remedial. Its purpose is to remove, and to afford relief from, uncertainty and insecurity with respect to rights, duties, status and other legal relations, and it is to be liberally construed and administered. Nothing in this chapter shall be held to affect the jurisdiction of the land court, and the procedure established hereby shall be in addition to any other procedure for declaratory relief.

CHAPTER 258. CLAIMS AND INDEMNITY PROCEDURE FOR THE COMMONWEALTH, ITS MUNICIPALITIES, COUNTIES AND DISTRICTS AND THE OFFICERS AND EMPLOYEES THEREOF.

Chapter 258: Section 10. Application of Secs. 1 to 8.
Section 10. The provisions of sections one to eight, inclusive, shall not apply to:-
(e) any claim based upon the issuance, denial, suspension or revocation or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization.